

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In re Applications of |) | |
| |) | |
| The Association for Community Education, Inc. |) | Facility ID No. 83327 |
| |) | |
| For Modification of Construction Permit for |) | File Nos. BMPFT-19980916TA, |
| Noncommercial Educational FM Translator Station |) | BMPFT-19990818TC |
| K211DK, Santa Ana, California, and |) | |
| |) | |
| For License to Cover Construction Permit |) | File No. BLFT-20020108ACP |

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004

Released: July 8, 2004

By the Commission:

1. The Commission has before it the timely filed December 3, 2001, Application for Review filed by the Santa Monica Community College District ("SMCCD").¹ SMCCD seeks review of the November 1, 2001, Mass Media Bureau ("Bureau") action ("2001 Staff Decision") granting the captioned application of The Association for Community Education, Inc. (the "Association") for modification of the construction permit of noncommercial educational ("NCE") FM translator station K211DK, Santa Ana, California (the "1999 Modification Application").² The Commission also has before it (1) the November 25, 1998, "Motion to Treat Informal Objection as Petition for Reconsideration" of the Bureau's October 22, 1998 grant of a previous modification application for K211DK (the "1998 Modification Application"); and (2) the Association's January 8, 2002, application for license to cover the K211DK construction permit.³ For the reasons set forth below, we deny reconsideration and review, and we grant the K211DK license application.

Background

2. On September 10, 1996, the Association tendered its original application⁴ for a new NCE FM translator on Channel 211 at Santa Ana, California. SMCCD petitioned to deny that application, arguing that the proposed translator would cause interference to a substantial number of listeners of its first-adjacent-channel station, KCRW(FM), Santa Monica, California. SMCCD argued that the application should be dismissed pursuant to Section 74.1204(f) of the rules because, if implemented, the Association's translator station would cause interference to reception of KCRW(FM).⁵ The Association subsequently filed a "major

¹ SMCCD is the licensee of NCE-FM station KCRW(FM), Santa Monica, California.

² *Letter to John S. Neely, Esq. and Harold K. McCombs, Esq.*, (M.M. Bur. Nov. 1, 2001).

³ Pursuant to 47 C.F.R. Section 0.5(c), the Bureau has referred the license application to the Commission as a matter of administrative convenience. One of the issues raised in the application for review is properly considered only in the context of the K211DK license application.

⁴ File No. BPFT-19960910TB.

⁵ 47 C.F.R. § 74.1204(f) reads as follows:

amendment” to its application, and the amended application was then assigned a new file number under Section 74.1233(a)(1) of the rules.⁶ The Association further amended the proposal in accordance with a staff request, and on August 26, 1998, the Bureau denied SMCCD’s petition and granted the Association’s amended application.⁷ SMCCD timely sought reconsideration of this action. The Bureau denied reconsideration on January 31, 2000.⁸

3. On September 16, 1998, the Association filed the 1998 Modification Application to modify the initial construction permit for K211DA. This major modification application proposed to reduce power to 7 Watts ERP and operate from a different location.⁹ On October 13, 1998, the Association amended the proposal to transform the application from a major change to a minor change. The staff accepted that amendment and granted the 1998 Modification Application on October 22, 1998. On November 2, 1998, SMCCD informally objected to the 1998 Modification Application, not realizing that the application had already been granted by the staff.¹⁰ On November 25, 1998, SMCCD requested that the Bureau reconsider its grant of the 1998 Modification Application.¹¹ That pleading has been referred to the Commission *en banc* by the Chief, Media Bureau, for consideration with SMCCD’s application for review pursuant to Section 1.106(a)(1).

4. Subsequently, the Association filed the 1999 Modification Application, proposing to increase K211DK’s ERP to 10 watts, the same ERP specified in the Association’s original 1996 application. The Staff Decision denied SMCCD’s informal objection¹² and granted the application. SMCCD has sought review of that action. The Association then constructed and commenced operation of K211DK, filing an

An application for an FM translator station will not be accepted for filing even though the proposed operation would not involve overlap of field strength contours with any other station, as set forth in paragraph (a) of this section, if the predicted 1 mV/m field strength contour of the FM translator station will overlap a populated area already receiving a regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including Class D (secondary) noncommercial educational FM stations and grant of the authorization will result in interference to the reception of such signal.

⁶ BPFT-19970218TE.

⁷ *Letter to Lewis J. Paper, Esq. and Christopher D. Imlay, Esq.*, (M.M. Bur. Aug. 26, 1998). The letter granted the Association to operate with an effective radiated power of 10 watts, an antenna center of radiation 906 meters above mean sea level, from the coordinates 33 ° 49’ 42” North Latitude, 117° 38’ 18” West Longitude.

⁸ *Letter to Dickstein Shapiro Morin & Oshinsky, et al.*, (M.M. Bur. Jan. 31, 2000).

⁹ The Bureau released a *Public Notice* accepting this major modification application on September 21, 1998. See Report No. 24330 p. 7.

¹⁰ SMCCD points out that *Public Notice* of the staff’s acceptance of the amendment was released on October 23, 1998, after the grant date of the 1998 Modification Application. In any event, as discussed below, the outcome on the substantive issue raised in the informal objection is considered fully.

¹¹ See SMCCD’s November 25, 1998 “Motion to Treat Informal Objection as Petition for Reconsideration.”

¹² The informal objection contained an Engineering Exhibit from SMCCD’s Consulting Engineer purporting to show that the operation of K211DK as proposed in the 1999 Modification Application would cause interference to KCRW(FM). It also includes 13 letters from listeners residing in areas purportedly as within ZIP Codes either totally or partially within the translator’s proposed 60 dBμ contour, although eight of those letters are from residences located in the “90405” ZIP Code which is *not* listed as being within K211DK’s service contour.

application for covering license on January 8, 2002. The Commission has to date received no complaints of interference from KCRW(FM) listeners due to operation of the translator station.

Discussion

5. **SMCCD Petition for Reconsideration.** *Request to Treat Informal Objection as Petition for Reconsideration.* SMCCD requests that its untimely informal objection to the 1998 Modification Application be treated as a petition for reconsideration of the October 22, 1998, grant of that application. The substantive issue raised in that objection – that the 1998 Modification Application should not be granted because K211DK’s proposed operation “would be likely to interfere with the off-air reception of KCRW(FM)” – is repeated in its December 3, 2001, Application for Review.

6. Section 73.3587 of the Commission’s rules requires that an informal objection to a broadcast application be filed prior to action on the application.¹³ Additionally, under Section 1.106 of the Commission’s rules, petitions for reconsideration from parties that did not participate prior to grant must contain a justification for the party’s failure to do so.¹⁴ While the Commission has accorded standing to petitioners for reconsideration who failed to file pre-grant objections when prompt staff action “effectively precludes participation during the initial consideration of an application” -- such as when an application is granted four or five days after Public Notice of its acceptance¹⁵ -- we will not award SMCCD such standing here. SMCCD had more than 30 days -- from September 21, 1998, the date on which the 1998 Modification Application was accepted via *Public Notice*,¹⁶ until October 22, 1998, when the application was granted -- to object to the application, and it failed to do so. This is all that Section 309 of the Communications Act requires for a “major change” in facilities. The post-grant release of the Public Notice accepting the amendment that converted the application to a minor change (and thereby eliminated the requirement to wait thirty days for potential objections) did not extend SMCCD’s filing deadline.¹⁷ In any event, because the informal objection raises essentially the same argument as that presented in SMCCD’s application for review, SMCCD’s contentions will be fully considered herein. We therefore deny SMCCD’s November 25, 1998, Motion.

7. **Application for Review.** *Allegation of ex parte rule violations.* In its application for review, SMCCD first argues that the Association violated the Commission’s *ex parte* rules¹⁸ because the Association did not serve SMCCD with its 1998 Modification Application, the October amendment to that Application, or its 1999 Modification Application. SMCCD states that “it would not be unreasonable to consider each

¹³ See 47 C.F.R. § 73.3587 (“Before FCC action on any application for an instrument of authorization, any person may file informal objections to the grant.”)

¹⁴ See 47 C.F.R. § 1.106(b)(1) (petitioners who are not parties to the proceeding must “show good reason why it was not possible for it to participate in the earlier stages of the proceeding”); *North Texas Radio, Inc.*, 11 FCC Rcd 8531, 8543 (1996).

¹⁵ See, e.g., *Aspen FM, Inc.*, 12 FCC Rcd 17852, 17854 (1997) (standing awarded to file petition for reconsideration without pre-grant objection when application granted five days after Public Notice of its acceptance); *Ted and Jana Tucker*, 4 FCC Rcd 2816 (1989) (standing to file petition for reconsideration without pre-grant objection when application granted four days after Public Notice of its acceptance).

¹⁶ See *supra* note 9.

¹⁷ See 47 U.S.C. § 309(c) and 47 C.F.R. § 73.3580.

¹⁸ 47 C.F.R. §§ 1.1201 *et seq.*

of the . . . applications as part of a single, continuous, fluid, uninterrupted, restricted proceeding," thus requiring that it be served with all of petitioner's filings, including the applications. SMCCD further contends that, even if each application is a restricted proceeding, it would be a restricted proceeding "involving the same decision-making personnel and involving the same fundamental issue relating to the same Translator Station. [Applicant] would, under that view, have an obligation to avoid making written *ex parte* presentations to Commission decision-making personnel in each restricted proceeding, all of whom are the same people, until each restricted proceeding was no longer subject to administrative or judicial reconsideration or review."¹⁹

8. SMCCD is incorrect. As noted below, Section 1.1202(d) defines a "party" to the proceeding as "any person who files an application, waiver request, motion, request for declaratory ruling, or other filing seeking affirmative relief." The Bureau correctly held that SMCCD did not become a party to this proceeding until after it had filed its informal objection on October 13, 1999, nearly two months after the filing of the 1999 Modification Application. Accordingly, the Association was under no obligation to file a copy of its application with SMCCD. Moreover, Section 1.1204(a)(1) of the *ex parte* rules classifies among "exempt presentations" those in which "[t]he presentation . . . involves the filing of required forms." Requests for technical modification of FM translator authorizations, and the amendment filed by the Association converting the 1998 Modification Application to a minor change, must be filed on FCC Form 349.²⁰ Accordingly, the Association had no obligation to serve SMCCD with a copy of any of its subsequent applications or amendments thereto until SMCCD had obtained "party status" pursuant to Section 1.1202(d)(1) of the rules.

9. *Allegation of interference to listeners residing within K211DK's service contour.* SMCCD's primary argument is that the operation of K211DK will cause interference to listeners of its station, KCRW(FM), and, therefore, that the staff should have returned the application pursuant to Section 74.1204(f). SMCCD argues that its informal objection to the 1999 Modification Application included 13 letters from 16 separate listeners of KCRW(FM), all having Santa Ana addresses and located in the Santa Ana 92705 ZIP Code; it states that the Association admitted that K211DK's proposed protected (60 dBμ) contour overlaps a significant portion of that Santa Ana ZIP Code.²¹ Nevertheless, the Bureau held that its engineering study revealed that "the city of Santa Ana is located approximately 8 kilometers beyond the farthest-reaching lobe in the direction of Santa Ana of the proposed translator's 60 dBμ contour." SMCCD states that it "fails to understand" how the Bureau can ignore KCRW(FM) listeners located in the city of Santa Ana because K211DK purports to serve the city of Santa Ana. It claims that the staff erred in disregarding the fact that K211DK's 60 dBμ contour covers a significant portion of the Santa Ana 92705 ZIP Code from which the 13 listener letters originated. SMCCD charges that the Bureau "arbitrarily ignored" the Engineering Exhibit attached to its informal objection, which it claims "focused on reception and interference within and in the immediate vicinity of the proposed translator's 60 dBμ contour."²²

10. In promulgating Section 74.1204(f), the Commission stated that it "will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted

¹⁹ Application for Review at 10.

²⁰ See 47 C.F.R. §§ 73.3500, 73.3511. See also 47 U.S.C. § 319(a).

²¹ See the Association's October 29, 1999 "Reply to Informal Complaint," p. 4.

²² Application for Review at 12.

overlap.”²³ In the Engineering Exhibit attached to the informal objection, and in the similar engineering exhibit appended to the application for review, SMCCD’s consulting engineer used KCRW(FM)’s original 1999 “subscriber data base” to determine the number of subscribers residing within ZIP Codes covered by the proposed translator’s 60 dBμ contour. SMCCD “determine[d] the area of a particular ZIP Code that was within the modified translator’s 60 dBμ contour, and compare[d] that to the total ZIP Code area. That percentage was then applied to the total KCRW subscribers within that ZIP Code to approximate the number of subscribers within the modified translator’s 60 dBμ contour.”²⁴ Thus, this methodology assumed that there was a relatively uniform distribution of subscribers within the studied ZIP Code. On this basis, SMCCD contends that there are an appreciable number of KSRW listeners/subscribers who would receive interference from the modified translator.

11. SMCCD’s initial attempt to demonstrate that it has listeners within the K211DK 60 dBμ contour proposed in the 1999 Modification Application was insufficient to warrant further action. SMCCD’s statement that KCRW(FM) has subscribers within a ZIP Code partially encompassed by the translator’s 60 dBμ contour is insufficient to demonstrate that KCRW(FM) has actual listeners within the translator station’s protected service contour. This methodology is particularly untenable here because, as SMCCD concedes, the ZIP Code map used in its 1999 Informal Objection “proved to be inaccurate, as the U.S. Postal Service had realigned the ZIP Code boundaries after that map was published. Even if accurate, that map did not provide the detail necessary to locate any street addresses.”²⁵ Thus, the Engineering Statement and the 13 listener letters attached to the informal objection fail to demonstrate the existence of KCRW(FM) listeners within the translator station’s proposed 60 dBμ contour, and the Bureau acted properly in denying the objection based on that material.

12. SMCCD also included an Engineering Exhibit with its Application for Review. That submission, which relies on the same 1999 KCRW(FM) subscriber data base, identified and listed each subscriber whose address fell within the translator’s 60 dBμ contour.²⁶ Using that methodology, SMCCD submits that there are 84 KCRW(FM) subscribers/listeners within the K211DK proposed 60 dBμ contour, although “there can be no question that there will be more listeners to a NCE-FM station than subscribers . . . so the number of KCRW listeners which will receive interference from the modified translator will be significantly higher than 84 subscribers.”²⁷ Table 1 of the Engineering Exhibit includes partial subscriber information -- omitting subscribers’ names and rounding street addresses to the “hundred block” in order to “protect the confidentiality of the KCRW data base.”

13. We also believe that the evidence supporting SMCCD’s Application for Review is unpersuasive.²⁸ The location of purported listeners -- accepting *arguendo* that membership in SMCCD’s

²³ See *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212, 7230 (1990) (“*Translator Report and Order*”), modified, 6 FCC Rcd 2334 (1991), *recon. den.*, 8 FCC Rcd 5093 (1993).

²⁴ Application for Review, Engineering Exhibit, p. 1.

²⁵ *Id.*, at p. 3.

²⁶ SMCCD indicates that the primary ZIP Codes within the main lobe of the 1999 Modification Application are 92602, 92705, and 92782. He proffers that the address of 2 subscribers within the 60 dBμ contour fell in the 92602 ZIP Code, 44 fell within the 92705 ZIP Code, and 38 fell within the 92782 ZIP Code.

²⁷ Application for Review, Engineering Exhibit, p. 2.

²⁸ The submission of new facts on review is prohibited. Section 1.115(c) states that an application for review will not be granted “if it relies on questions of fact or law upon which the designated authority has been afforded no

“subscriber database” equates with being a KCRW(FM) listener -- must be sufficiently specific to permit the Commission to verify the presence of *bona fide* listeners within the translator station’s service contour.²⁹ We conclude that the information proffered in the Engineering Statement appended to SMCCD’s Application for Review is insufficient. We clarify that, in order to provide “convincing evidence” under Section 74.1204(f) that grant of the translator construction permit “will result in interference to the reception” of an existing full-service station, an opponent must provide, at a minimum: (1) the name and specific address of each listener for which it claims credit; (2) some demonstration that the address of each purported listener falls within the 60 dBμ contour of the proposed translator station;³⁰ (3) some evidence, such as a declaration from each of the claimed listeners, that the person, in fact, listens to the full-service station at the specified location; and (4) evidence that grant of the authorization will result in interference to the reception of the “desired” station at that location. In a recent decision, we addressed and approved the staff’s practice of permitting translator applicants to use the “undesired-to-desired” (“U/D”) signal strength ratio methodology to demonstrate lack of interference in the context of Section 74.1204(d).³¹ The same method may also be used to demonstrate the potential for interference under 74.1204(f). Specifically, while Section 74.1204(d) requires an applicant to show that a specific U/D signal strength ratio is NOT exceeded (*i.e.*, interference would not occur), Section 74.1204(f) would require an objector to show that a specific U/D signal strength ratio IS exceeded at the location of a *bona fide* listener of the “desired” station to establish that interference “will result.”

14. K211DK License Application. *Allegation of interference to mobile listeners.* Finally, in response to the Bureau’s observation that “[s]hould operation of [the proposed translator station] cause actual interference to the direct reception of KCRW(FM)’s direct off-the-air input signal, [Association] will then be required to remedy an such actual interference or cease operation in accordance with Section 74.1203,”³² KCRW(FM)’s Chief Engineer Steven P. Herbert “drove the Translator Station’s signal and observed reception of both KCEW and the Translator Station.”³³ The route and results of this trip are set forth in Attachment 3 of the Application for Review. Mr. Herbert indicates that he made the observations from approximately 8:30 to 9:30 p.m. on November 27, 2001, in a 1984 Chrysler E-Class Sedan with a factory installed radio; he states that at the time KCRW(FM) was airing a live session of the Santa Monica City Council meeting and K211DK was airing “a variety of Spanish-language religious programming.” Mr. Herbert identified specific locations along his route at which K211DK affected or completely obscured reception of KCRW(FM), marking these locations on a map of area roads. This allegation, involving claims of *actual* interference, has no relevance to the propriety of the Bureau’s interpretation of Section 74.1204(f)

opportunity to pass.” The revised attempt to demonstrate the presence of KCRW listeners within the proposed K211DK 60 dBμ contour was not presented to the Bureau. We could therefore dismiss this argument without further consideration. However, we believe that further clarification on the issue of what constitutes “convincing evidence” of listenership subject to interference from an FM translator station for the purpose of applying Section 74.1204(f) will be beneficial to both translator station applicants and potentially impacted stations. Accordingly, we will waive this rule and entertain SMCCD’s arguments here.

²⁹ AMCCD did not seek to avail itself of the procedures that permit materials submitted to the Commission to be withheld from public inspection. *See, e.g.*, 47 C.F.R. § 0.459.

³⁰ The best method, of course, is to plot the specific addresses on a map depicting the translator station’s 60 dBμ contour.

³¹ *See Living Way Ministries*, 17 FCC Rcd 17054, 17056 (2002) (when demonstrating that “no actual interference will occur due to . . . other factors” pursuant to Section 74.1204(d), an applicant may use the U/D ratio method).

³² Staff Decision, at 2.

³³ Application for Review at 13-14.

and its grant of the K211DK permit and modification applications, because action on these applications precedes station operation with the facilities specified therein. Accordingly, we will consider the Herbert complaint under Section 74.1203 in the context of the license application submitted subsequent to K211DK's construction and commencement of operations.

15. Section 74.1203(a) provides, in pertinent part, that an FM translator station "will not be permitted to continue to operate if it causes any actual interference to . . . the direct reception by the public of off-the-air signals of any authorized broadcast station" ³⁴ The Bureau interprets the rule very broadly: it places no geographic or temporal limitation on complaints, and it has long held that even mobile receivers, such as automobile radios, should not be subject to interference resulting from the operation of an FM translator or booster station. ³⁵ The FM translator rules strictly prohibit interference by these secondary service stations. Accordingly, "when convinced that a complaint or complaints of uncorrected interference are valid . . . [the Commission] will direct . . . [the FM translator or booster station] to discontinue operation." ³⁶

16. Under Section 74.1203(a), objectionable interference occurs when a translator station interferes with the "direct reception by the public." Thus, only a complaint from a *bona fide* listener of the desired station can force a translator station off the air. ³⁷ Evidence submitted by SMCCD here -- locating the points on a map where K211DK had a "negative impact on the KCRW signal" as KCRW(FM)'s Chief Engineer drove around the full-service station's coverage area listening to the car radio -- does not meet that criterion. ³⁸ Moreover, the staff has not received any other complaint of interference by K211DK. We conclude that the supporting information submitted by SMCCD does not provide a valid basis for requiring the suspension or termination of station K211DK's operations.

17. *Sufficiency of license application.* We have examined the K211DK license application and find that it complies with all pertinent statutory and regulatory requirements and that the station was constructed in accordance with the terms of its authorization. We therefore find that the public interest, convenience, and necessity would be furthered by grant of the application.

³⁴ 47 C.F.R. § 74.1203(a).

³⁵ See, e.g., *Forus FM Broadcasting of New York, Inc.*, 7 FCC Rcd 7880, 7882 (M.M. Bur. 1992) (because of the secondary nature of FM booster stations, and the resulting requirement that they provide interference-free service, such stations will not be permitted to cause interference to mobile receivers).

³⁶ *Translator Report and Order*, 5 FCC Rcd at 7230.

³⁷ See, e.g., *Valley Broadcasting, Inc.*, 7 FCC Rcd 4317, 4320 (M.M. Bur. 1992). We approve of the staff practice that has required that the complainant be "disinterested," e.g., a person or entity without a legal stake in the outcome of the translator station licensing proceeding. Thus, it has regularly discounted allegations of interference by employees or principals of full-service broadcast stations, preferring instead to base its conclusions on verifiable complaints from listeners of the full-service broadcast station whose reception may be affected by the translator station's operation. See, e.g., *Letter to Aaron P. Shainis, Esq. and James L. Oyster, Esq. (Station W279AD, Chesapeake, Virginia)*, (M.M. Bur. Jan 9, 2003); *Letter to Robert J. Rini, Esq. and Arthur S. Landerholm, Esq. (Station W220CV, Winnsboro, South Carolina)*, (M.M. Bur. Apr. 5, 2002).

³⁸ See, e.g., *Valley Broadcasting, supra*, 7 FCC Rcd at 4319 (tests for booster interference conducted under Special Field Test Authority by a neutral party, using a mobile receiver at five sites suggested by applicant and five sites suggested by petitioner, as well as using a stationary receiver at seven sites suggested by applicant and seven by petitioner). Even in that case, the application was granted with the *caveat* that if the booster station resulted in listener interference complaints, the permittee would be required to discontinue its operation until all complaints had been resolved.

Conclusion/Actions

18. In accordance with the preceding discussion, IT IS ORDERED that the November 25, 1998, Motion to Treat Informal Objection as Petition for Reconsideration filed by Santa Monica Community College District IS DENIED, and its November 2, 1998, Informal Objection IS DISMISSED. IT IS FURTHER ORDERED, that the December 3, 2001, Application for Review filed by Santa Monica Community College District IS DENIED, and the application (File No. BLFT-20020108ACP) of the Association for Community Education, Inc. for license to cover the modified construction permit for FM translator station K211DK IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary